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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

6 \* \* \*

7 LEODEGARIO SALVADOR,

8 Plaintiff(s),

9 v.

10 NATIONAL DEFAULT SERVICING  
11 CORPORATION, et al.,

12 Defendant(s).

Case No. 2:13-CV-1011 JCM (GWF)

ORDER

13  
14 Presently before the court is defendant/counter-claimant Wells Fargo Bank, N.A.'s ("WF")  
15 motion for summary judgment against plaintiff/counter-defendant Leodegario Salvador. (ECF No.  
16 70). Specifically, that motion seeks a determination that the foreclosure sale be set aside based  
17 upon WF's federal constitutional arguments. (*Id.*); *see also* (ECF No. 43). Mr. Salvador,  
18 appearing in this case *pro se*, did not file an opposition to the instant motion, and WF submitted a  
19 notice of non-opposition to the motion. (ECF No. 73).

20 **I. Introduction**

21 This case involves the validity of a September 26, 2012, HOA foreclosure sale of the real  
22 property at 4228 Rollingstone Drive, Las Vegas, NV 89103 (the "property"). (ECF No. 1-2); *see*  
23 *also* (ECF No. 70). The complaint in this case indicates that "[t]he foreclosure sale was conducted  
24 by Alessi & Koenig, LLC, agent for Glenview West Townhomes Association HOA, pursuant to  
25 the powers conferred by the Nevada Revised Statutes 116.3116, 116.31162, 116.31163 and  
26 116.31164." (*Id.* at 3). Ultimately, plaintiff—who purchased the property at the relevant  
27 nonjudicial foreclosure sale—sought to quiet title in the property against all defendants. (*Id.*).  
28

1 On January 13, 2016, WF submitted an answer and counterclaims against plaintiff. (ECF  
2 No. 43). *Inter alia*, WF seeks to set aside the foreclosure sale based upon a violation of its federal  
3 due process rights because it had an interest in the property pursuant to the July 29, 2011, corporate  
4 assignment of deed of trust. (ECF No. 70); *see also* (ECF No. 70-6).

5 A failure to respond to a motion for summary judgment is not a sufficient condition for that  
6 motion's success. *See* LR 7-2(d); *see also Heinemann v. Satterberg*, 731 F.3d 914, 917–18 (9th  
7 Cir. 2013). A district court may grant an unopposed motion for summary judgment only if the  
8 movant's filings satisfy the summary judgment standard. *See White v. Aramark*, No. 14-55405,  
9 2016 WL 6583620, at \*1 (9th Cir. Nov. 7, 2016) (citing *Henry v. Gill Indus., Inc.*, 983 F.2d 943,  
10 950 (9th Cir. 1993)). The court proceeds accordingly.

## 11 II. Legal Standard

12 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,  
13 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,  
14 show that “there is no genuine dispute as to any material fact and the movant is entitled to a  
15 judgment as a matter of law.” Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is  
16 “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317,  
17 323–24 (1986).

18 For purposes of summary judgment, disputed factual issues should be construed in favor  
19 of the non-moving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to be  
20 entitled to a denial of summary judgment, the nonmoving party must “set forth specific facts  
21 showing that there is a genuine issue for trial.” *Id.*

22 In determining summary judgment, a court applies a burden-shifting analysis. The moving  
23 party must first satisfy its initial burden. “When the party moving for summary judgment would  
24 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a  
25 directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has  
26 the initial burden of establishing the absence of a genuine issue of fact on each issue material to  
27 its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000)  
28 (citations omitted).

1 By contrast, when the nonmoving party bears the burden of proving the claim or defense,  
2 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential  
3 element of the non-moving party's case; or (2) by demonstrating that the non-moving party failed  
4 to make a showing sufficient to establish an element essential to that party's case on which that  
5 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving  
6 party fails to meet its initial burden, summary judgment must be denied and the court need not  
7 consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–  
8 60 (1970).

9 If the moving party satisfies its initial burden, the burden then shifts to the opposing party  
10 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*  
11 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the  
12 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient  
13 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing  
14 versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,  
15 631 (9th Cir. 1987).

16 In other words, the nonmoving party cannot avoid summary judgment by relying solely on  
17 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,  
18 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the  
19 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue  
20 for trial. *See Celotex*, 477 U.S. at 324.

21 At summary judgment, a court's function is not to weigh the evidence and determine the  
22 truth, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby,*  
23 *Inc.*, 477 U.S. 242, 249 (1986). Nonmovant's evidence is “to be believed, and all justifiable  
24 inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is  
25 merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at  
26 249–50.

27 . . .

28 . . .

1                   **III. Discussion**

2                   The Ninth Circuit in *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 832 F.3d 1154  
3 (9th Cir. 2016), *cert. denied*, No. 16-1208, 2017 WL 1300223 (U.S. June 26, 2017) (“*Bourne*  
4 *Valley*”) held that NRS 116.3116’s “opt-in” notice scheme, which required a HOA to alert a  
5 mortgage lender that it intended to foreclose only if the lender had affirmatively requested notice,  
6 facially violated mortgage lenders’ constitutional due process rights. *Bourne Valley*, 832 F.3d at  
7 1157–58. The facially unconstitutional provision, as identified in *Bourne Valley*, exists in NRS  
8 116.3116(2). *See id.* at 1158. The facial invalidation of that particular statute hardly uproots the  
9 entirety of NRS Chapter 116. Moreover, WF spends much of its motion arguing a point—that  
10 opt-in notice is constitutionally insufficient—that has already been made by the Ninth Circuit in  
11 *Bourne Valley*, 832 F.3d at 1157–58.

12                  To state a procedural due process claim, a claimant must allege “(1) a deprivation of a  
13 constitutionally protected liberty or property interest, and (2) a denial of adequate procedural  
14 protections.” *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir.  
15 1998). WF has satisfied the first element as a deed of trust is a property interest under Nevada  
16 law. *See Nev. Rev. Stat. § 107.020 et seq.*; *see also Mennonite Bd. of Missions v. Adams*, 462 U.S.  
17 791, 798 (1983) (stating that “a mortgagee possesses a substantial property interest that is  
18 significantly affected by a tax sale”); (ECF No. 70-6) (assigning WF the deed of trust).

19                  Due process does not require actual notice. *Jones v. Flowers*, 547 U.S. 220, 226 (2006).  
20 Rather, it requires notice “reasonably calculated, under all the circumstances, to apprise interested  
21 parties of the pendency of the action and afford them an opportunity to present their objections.”  
22 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also Bourne Valley*,  
23 832 F.3d at 1158.

24                  WF concedes in the instant motion that actual notice is constitutionally sufficient notice.  
25 (ECF No. 70 at 10–11). Notably, WF makes arguments that, although approaching the statement  
26 “WF did not receive actual notice,” never cross that threshold. *See generally* (ECF No. 70). For  
27 example, WF states that the recorded notices could not have provided the “best notice under the  
28

1 circumstances.” (*Id.* at 12). Indeed, receipt of actual notice deprives a claimant of standing to  
2 raise a procedural due process claim. *Wiren v. Eide*, 542 F.2d 757, 762 (9th Cir. 1976).

3 Thus, WF has failed to make an initial showing of its entitlement to summary judgment for  
4 its failure to argue a lack of actual notice. *C.A.R. Transp. Brokerage Co.*, 213 F.3d at 480.

5 Next, WF presumes to have standing, under the facts of this case, to assert claims under  
6 the Supremacy and Property clauses essentially on behalf of the Federal Housing Administration.  
7 (ECF No. 70). It does not have standing. *See Bank of Am., N.A. v. Valley View Meadows*  
8 *Homeowners Ass’n, Inc.*, No. 2:16-cv-275-JCM-CWH, 2017 WL 2870087, at \*8 (D. Nev. July 5,  
9 2017) (citing *JPMorgan Chase Bank, N.A. v. SFR Investments Pool 1, LLC*, 200 F. Supp. 3d 1141,  
10 1161 (D. Nev. 2016)).

11 Finally, WF argues that the HOA foreclosure sale violated the Takings Clause of the United  
12 States Constitution. The takings clause prohibits the state from taking private property for public  
13 use without just compensation. U.S. Const. amend. V. WF’s argument, however, has been  
14 rejected. *See, e.g., Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., a Div.*  
15 *of Wells Fargo Bank, N.A.*, 388 P.3d 970, 975 (Nev. 2017) (“[T]he extinguishment of a subordinate  
16 deed of trust through an HOA’s nonjudicial foreclosure does not violate the Takings Clauses . . .  
17 .”). Accordingly, this claim cannot proceed.

#### 18 **IV. Conclusion**

19 In sum, WF has not shown that it is entitled to summary judgment, and the instant motion  
20 will be denied.

21 Accordingly,

22 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that WF’s unopposed motion  
23 for summary judgment (ECF No. 70), be and the same hereby is, DENIED.

24 DATED August 2, 2017.

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UNITED STATES DISTRICT JUDGE